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February 16, 2004

c/o Mrs. Sharon Tong,  
Clerk to Subcommittee  
Legislative Council of the Hong Kong Special Administrative Region  
Central  
Hong Kong

Dear Ms Tong:

**Re: Subcommittee on United Nations Sanctions (Liberia) Regulation 2003**

The present discussions of the Subcommittee raise important issues concerning the constitutionality of the United Nations Sanctions Ordinance (Cap 537) (UNSO).

Section 3 of the UNSO confers a mandatory law-making power on the Chief Executive that is independent of the Legislative Council (LegCo)'s legislative power. The purpose of the power is to implement in the HKSAR, by way of subsidiary legislation, binding decisions and measures of the United Nations (UN) Security Council made under Chapter VII of the UN Charter. The power is a mandatory one because once the Chief Executive receives relevant instructions from the Ministry of Foreign Affairs of the People's Republic of China, he must exercise his power to give effect to those instructions (s. 3(1)). The power is independent of the LegCo's legislative power because, by virtue of subsection 3(5), the usual authority of the LegCo to amend, repeal and, where provided, approve of subsidiary legislation has been removed. In other words, this power is unchecked by the LegCo.

However, the unique<sup>1</sup> qualities of this law-making power present fundamental constitutional problems. In particular, the power on its face appears to be inconsistent with the principles of separation of powers and executive accountability established under the Basic Law.

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<sup>1</sup> Note that s. 3(15) of Fugitive Offenders Ordinance (Cap 503) has an exclusionary clause similar to s. 3(5) of the UNSO.

Hong Kong courts have recognized that the Basic Law preserves the common law principle of separation of powers, and accordingly, legislation inconsistent with this principle is liable to be struck down.<sup>2</sup> The principle does not simply mean that the legislative, executive or judicial branches of government should not interfere with the day to day workings and functions of another branch. It also means that separate powers and functions are reserved for each of the branches. Thus, in *Yau Kwong Man v Secretary for Security*, where the Chief Executive was exercising a 'judicial function' (i.e. setting the minimum term for young offenders detained at Executive discretion), it was held that this practice was inconsistent with the principle of separation of powers.<sup>3</sup>

By the form and substance of regulations made under the UNSO, they appear to be the 'stuff of legislation'. In other words, these regulations create criminal offences, coercive police powers and other regulatory duties that have a direct effect on people in Hong Kong. The task of drafting and enacting such measures can clearly be described as a legislative function. By conferring this legislative function on the Chief Executive exclusively, it seems the principle of separation of powers has been compromised.

The second and related problem is in respect of the principle of executive accountability expressed in Article 64 of the Basic Law:

The Government of the Hong Kong Special Administrative Region must abide by the law and be accountable to the Legislative Council of the Region: it shall implement laws passed by the Council and already in force; it shall present regular policy addresses to the Council; it shall answer questions raised by members of the Council; and it shall obtain approval from the Council for taxation and public expenditure.

I do not believe that the listed functions are exhaustive of what it means to be accountable to the LegCo under Article 64. Where the Chief Executive exercises a legislative function, over which the LegCo has no lawful authority, it cannot be said that there is accountability to the LegCo. Given the potential of the police powers and criminal prohibitions contained in the regulations to impact on fundamental human rights of Hong Kong residents, the LegCo has (or should have) a great interest in having a measure of accountability and control over these regulations.

All of this is not to say that the Chief Executive cannot have such a law-making function. Indeed, the power and function of the Chief Executive to "implement the directives issued by the Central People's Government" would seem to require it.<sup>4</sup> But to be consistent with the Basic Law principles of separation of powers and executive accountability, the LegCo must be allowed to exercise its legislative power

<sup>2</sup> See *Yau Kwong Man & Another v Secretary for Security* [2002] 3 HKC 457 (CFI); *Lau Kwok Fai & Others v Secretary for Justice* [2003] HKEC 711 at ¶ 19 (CFI).

<sup>3</sup> *Ibid.*

<sup>4</sup> Basic Law, Article 48(8).

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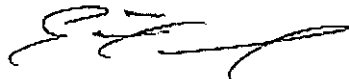
in this area. The practical implication of this is that the exclusionary clause in s. 3(5) of the UNSO should be removed.

Members of the Subcommittee may wish to have regard to the arrangements of other countries used to implement Security Council Chapter VII resolutions. I have attached the applicable Canadian legislation, United Nations Act, RSC 1985, c. U-2. Note s. 4 of that Act, which expressly provides for the tabling of regulations made under the Act before Parliament and the power of Parliament to annul such regulations.

Finally, it follows from the above that any relevant certificate or formal document from the Ministry of Foreign Affairs of the PRC should be made available to the LegCo to enable its members to carry out its legislative function more effectively. If two branches of government are to have shared responsibilities in this area, then it only makes sense that there is transparency between the two branches to enhance the overall performance of the task.

Thank you for this opportunity.

Yours truly,



Simon N.M. Young  
Associate Professor  
Deputy Head, Department of Law  
Deputy Director, Centre for Comparative and Public Law

Encl.

cc Professor Johannes Chan, Dean of the Faculty of Law  
Professor Roda Mushkat, Head of the Department of Law

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CURRENT TO FEBRUARY 12, 2004

## United Nations Act

### R.S.C. 1985, c. U-2

An Act respecting Article 41 of the Charter of the United Nations

#### SHORT TITLE

##### *Short title*

1. This Act may be cited as the United Nations Act.

R.S.C. 1970, c. U-3, s. 1.

#### ORDERS AND REGULATIONS OF THE GOVERNOR IN COUNCIL

##### *Application of Security Council decisions*

2. When, in pursuance of Article 41 of the Charter of the United Nations, set out in the schedule, the Security Council of the United Nations decides on a measure to be employed to give effect to any of its decisions and calls on Canada to apply the measure, the Governor in Council may make such orders and regulations as appear to him to be necessary or expedient for enabling the measure to be effectively applied.

R.S.C. 1970, c. U-3, s. 2.

##### *Offence and punishment*

3. (1) Any person who contravenes an order or regulation made under this Act is guilty of an offence and liable

- (a) on summary conviction, to a fine of not more than \$100,000 or to imprisonment for a term of not more than one year, or to both; or
- (b) on conviction on indictment, to imprisonment for a term of not more than 10 years.

##### *Forfeiture*

(2) Any property dealt with contrary to any order or regulation made under this Act may be seized and detained and is liable to forfeiture at the instance of the Minister of Justice, on proceedings in the Federal Court, or in any superior court, and any such court may make rules governing the procedure on any proceedings taken before the court or a judge thereof under this section.

**\*\* Quicklaw Table \*\***

For changes prior to Quicklaw Tables, please see other sources for in force information.

Provision	Changed by	In force	Authority
3	2001 c41 s112	2001 Dec 24	SI/2002-16

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R.S.C. 1970, c. U-3, s. 3; R.S.C. 1970, c. 10 (2nd Supp.), s. 64; S.C. 2001, c. 41, s. 112.

*Tabling in Parliament*

4. (1) Every order and regulation made under this Act shall be laid before Parliament forthwith after it has been made or, if Parliament is not then sitting, forthwith after the commencement of the next ensuing session.

*Resolution*

(2) If both the Senate and House of Commons within the period of forty days, beginning with the day on which an order or regulation is laid before Parliament pursuant to subsection (1) and excluding any time during which Parliament is dissolved or prorogued or during which both the Senate and House of Commons are adjourned for more than four days, resolve that it be annulled, it ceases to have effect, but without prejudice to its previous operation or anything duly done or suffered thereunder or any offence committed or any punishment incurred.

R.S.C. 1970, c. U-3, s. 4.

**SCHEDULE**

**(Section 2)**

ARTICLE 41-The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

R.S.C. 1970, c. U-3, Sch.